Hi-Tech Corporation, a subsidiary of Southwire Company *and* International Brotherhood of Electrical Workers, Local Union No. 1510. Case 26–CA–14536

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Issues presented for Board review in this case are whether the judge correctly found that: the Respondent did not violate Section 8(a)(5) of the Act when it unilaterally instituted and enforced a no-tobacco usage rule; the Respondent did violate Section 8(a)(5) by unilaterally changing a past practice of giving copies of warnings to the warned employee or to the Union, and by refusing to provide certain information to the Union; and the Respondent violated Section 8(a)(1) by discharging employee Mickle Smith.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions with respect to the unilateral change, the refusal to supply information, and the discharge. However, we reverse the judge with respect to the no-tobacco rule issue, and we adopt the recommended Order only as modified.

The Respondent and the Union began negotiations for a new collective-bargaining agreement in March 1990. After approximately 22 bargaining sessions, the Respondent declared impasse on July 11, 1990,[3] and implemented its final offer. Article II, *Rights of Management*, of the implemented final offer states that the Respondent retained the sole right and authority to:

> Section 1 . . . make, change, and enforce reasonable rules for efficiency, cleanliness, safety, attendance, conduct and working conditions . . . [and]
>
> Section 3 . . . in its sole discretion, to make reasonable rules and regulations for the purpose of efficiency, safe operation, and maintaining order and discipline among the workforce.

Article XII, *Discharge, Discipline and Company Rules*, states:

> The Company alone has the right to make such reasonable rules and regulations, subject to the Union's right to grieve the reasonableness, as it may from time to time deem best for the purposes of maintaining order, effecting safe operation of the plant, and promoting efficiency. The Company will give the union a copy of any new or changed rule prior to putting said rule into effect. The Union agrees to uphold such rules and regulations established by the Company.

During negotiations, the Union agreed to article XII on the condition that the Respondent agree to mandatory arbitration as the final step in the grievance procedure. The Respondent would not agree and proposed either voluntary arbitration or the right to resort to economic force, including the Respondent's right to lock out its employees. Respondent's proposals regarding management rights and the absence of mandatory arbitration were implemented as part of the Respondent's final offer.

In August 1990, the Respondent posted a notice stating that it would be a ''No Tobacco Usage Facility'' effective January 1, 1991. The plant's personnel manager removed the notice about 1 hour later. On January 11, 1991, the Respondent, without notice to the Union, posted a notice stating that effective April 1, 1991, it would ''become a No Tobacco usage facility.'' The Union requested a meeting to negotiate the reasonableness of the rule. The Respondent replied that, under the implemented management-rights clause, the Union could only grieve the reasonableness of the rule. The Union filed a grievance, which was denied. The Respondent denied the Union's request for arbitration. On September 25, 1991, the Respondent issued a written warning to employee Lannie Biddle for breach of the no-tobacco usage rule.

The judge found that the management-rights provisions of the Respondent's implemented final offer left the Union with its statutory rights essentially intact because the Union had the right to grieve the reasonableness of any new rule before implementation. Noting that the Respondent and the Union had processed the grievance through the third and final step, the judge concluded that the Respondent's implementation of the no-tobacco usage rule did not entail any waiver of the Union's statutory rights or refusal to bargain with the Union. Accordingly, the judge recommended dismissal of the complaint allegations that the Respondent violated Section 8(a)(5) by unilaterally adopting and enforcing a no-tobacco rule. We disagree with this recommendation and its underlying findings.

Contrary to the judge, we find that the Union's recourse to the grievance procedure concerning the reasonableness of the Respondent's no-tobacco rule did

[1] On May 6, 1992, Administrative Law Judge Michael O. Miller issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs. The Respondent also filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In his decision, the judge inadvertently referred to this date as July 11, 1991.

not afford the full bargaining rights assured by Section 8(a)(5) of the Act. The grievance procedure was used after the Respondent decided to implement the rule and it was confined to the issue of reasonableness. That is no substitute for full bargaining prior to the implementation of the rule. In addition, there was no waiver of the right to full bargaining. We find that the management-rights provisions relied on by the Respondent were not sufficient to constitute a clear and unequivocal waiver of the Union's right to bargain about the specific no-tobacco rule. In this regard, we agree with the General Counsel that the instant case is controlled by *Johnson-Bateman Co.*, 295 NLRB 180 (1989).[4] The Board there found that a generally worded management-rights clause, similar to the provisions at issue here, did not constitute a waiver of the union's statutory right to bargain about the specific mandatory bargaining subject of employee drug/alcohol testing. In order to establish the waiver of a statutory right as to a specific mandatory bargaining subject, there must be clear and unequivocal contractual language or comparable bargaining history evidence indicating that the particular matter at issue was fully discussed and consciously explored during negotiations, and that the union consciously yielded or clearly and unmistakably waived its interest in the matter.[5] Absent such evidence, the Board has consistently found that a general management-rights clause does not constitute a clear, unequivocal, and unmistakable waiver by the union of its statutory right to bargain about an employer's implementation of a work rule not specifically mentioned in the clause.[6]

The management-rights clause[7] contains only a generally worded provision granting the Respondent the right to unilaterally make, change, and enforce reasonable rules. The clause makes no reference to any particular mandatory bargaining subject, including the subject of tobacco usage in the workplace. There also is no evidence that the parties ever discussed implementing such a rule under the management-rights provision during their contract negotiations. We therefore find that the management-rights provisions invoked by the Respondent do not constitute an express, clear, unequivocal, and unmistakable waiver by the Union of its statutory right to bargain about the Respondent's institution and enforcement of the no-tobacco usage rule. Accordingly, we conclude that the Respondent violated Section 8(a)(5) and (1) by unilaterally instituting a no-tobacco usage rule and by issuing employee Biddle a written warning for violating the rule.[8]

ORDER

The National Labor Relations Board orders that the Respondent, Hi-Tech Cable Corporation, a subsidiary of Southwire Company, Starkville, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union by unilaterally instituting a rule prohibiting employees from using tobacco on the Company's property and enforcing the no-tobacco usage rule by issuing a written warning to employees.

(b) Discharging employees because they engage in protected concerted activities.

(c) Failing and refusing to bargain in good faith with the Union by refusing to give either the Union or the employee to whom a written warning is given a copy of that written warning before a grievance is filed, and by refusing to furnish the Union with other information it requested which was necessary to the processing of grievances and to the fulfillment of its responsibilities as the exclusive representative of the employees in the appropriate unit.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain collectively, on request, with the Union as the exclusive representative of the employees in the following appropriate unit concerning the no-tobacco usage rule and embody any understanding reached in a signed agreement. The appropriate unit is:

> All hourly rated production and maintenance employees at the Employer's cable and wire plant in Starkville, Mississippi, excluding office and clerical employees, technical and engineering employees, professional employees, management and supervisory employees as defined in the Act, and guards.

[4] Due to a mistaken citation in the General Counsel's posthearing brief, the judge erroneously believed that the General Counsel was relying on *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1991), enf. denied 939 F.2d 1392 (10th Cir. 1989), to challenge the Respondent's right to implement the management-rights provisions with respect to the no-tobacco usage rule. As clarified in the General Counsel's brief in support of exceptions, the General Counsel does not rely on this case. We therefore disavow any reliance on the judge's discussion of *Colorado-Ute*. If the management-rights clause had specifically covered rules concerning tobacco usage, the *Colorado-Ute* issue would be presented. However, as discussed herein, the clause did not do so.

[5] *Johnson-Bateman*, supra; *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982).

[6] *Johnson-Bateman Co.*, supra at 185.

[7] There were no exceptions to the finding that Respondent was privileged to implement its proposals after negotiations had reached impasse.

[8] We shall amend the recommended remedy to require that the Respondent rescind both the rule and the warning given to Biddle. Provisions in the Order and substitute notice reflect this amended remedy.

(b) Remove from employee Lannie Biddle's file the written warning resulting from the enforcement of the no-tobacco usage rule.

(c) Offer Mickle Smith immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(d) Remove from its files any reference to the unlawful discharge and notify Smith in writing that this has been done and that the discharge will not be used against him.

(e) Give either the Union or the employee to whom a written warning is given a copy of that written warning before a grievance is filed, and furnish the Union information it requests which is necessary to the processing of grievances and the fulfillment of its responsibilities as the exclusive representative of the employees in the appropriate unit.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its plant in Starkville, Mississippi, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally and without consultation with the International Brotherhood of Electrical Workers, Local Union No. 1510 institute a rule prohibiting employees from using tobacco on company property.

WE WILL NOT enforce the no-tobacco usage rule by issuing written warnings to employees who violated the rule.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities for your mutual aid or protection or for supporting the International Brotherhood of Electrical Workers, Local Union No. 1510 or any other union.

WE WILL NOT refuse to bargain with the International Brotherhood of Electrical Workers, Local Union No. 1510 by refusing to give either the Union or the employee to whom a written warning is given a copy of that written warning before a grievance is filed, or by refusing to furnish the Union with other information it requests which is necessary to the processing of grievances and to the fulfillment of its responsibilities as the exclusive representative of the employees in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL cancel, withdraw, and rescind the no-tobacco usage program we unlawfully put into effect, and WE WILL bargain collectively, on request, with the Union concerning the no-tobacco usage rule as the exclusive representative of employees in the following appropriate unit:

> All hourly rated production and maintenance employees at Hi-Tech Cable Corporation's cable and wire plant in Starkville, Mississippi, excluding office and clerical employees, technical employees, professional employees, management and super-

visory employees as defined in the Act and guards constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

WE WILL remove from employee Lannie Biddle's files the written warning resulting from the enforcement of the no-tobacco usage rule, and WE WILL notify him in writing that we have done so.

WE WILL offer Mickle Smith immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Mickle Smith that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL give either the Union or the employee to whom a written warning is given a copy of that written warning before a grievance is filed, and WE WILL furnish the Union information it requests which is necessary to the processing of grievances and the fulfillment of its responsibilities as the exclusive representative of the employees in the appropriate unit.

HI-TECH CABLE CORPORATION, A SUBSIDIARY OF SOUTHWIRE COMPANY

Jack Berger, Esq., for the General Counsel.
Walter O. Lambeth Jr., Esq. and *Douglas H. Duerr, Esq. (Elarbee, Thompson & Trapnell)*, for the Respondent.
Herman E. Holley, International Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Starkville, Mississippi on February 12 and 13, 1992, based on an unfair labor practice charge filed on June 17, 1991, as amended, on October 21, 1991, by International Brotherhood of Electrical Workers, Local Union No. 1510 (the Union), and a complaint issued by the Regional Director of Region 26 of the National Labor Relations Board (the Board), on July 22, 1991, as thereafter amended. The complaint alleges that Hi-Tech Cable Corporation, a subsidiary of Southwire Company (Respondent or the Employer), unilaterally adopted and enforced a no-tobacco rule, refused to furnish the Union with information necessary for collective bargaining, and discharged an employee because he engaged in protected concerted activities, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS

Preliminary Conclusions of Law

The Employer is a corporation engaged in the manufacture, sale, and distribution of wire and cable products at its facility in Starkville, Mississippi. In the course and conduct of its business operations, it annually sells and ships goods and materials valued in excess of $50,000 directly to points located outside the State of Mississippi. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Southwire Corporation acquired Hi-Tech Cable in the fall of 1989. Hi-Tech's employees have been represented by the Union for a number of years, under a succession of plant owners. Respondent recognized the Union and, about March 22, 1990, commenced bargaining for a new contract.

On July 11, 1991, after about 22 bargaining sessions, Respondent declared that the parties were at impasse and implemented its final offer. There is no contention that Respondent had bargained in bad faith or that the parties were not, in fact, at impasse.

B. *The No-Tobacco Rule*

1. The facts

In the course of negotiations, Respondent had proposed language which would permit it to unilaterally set and implement rules. That language, found in various articles, remained in the final offer, which it implemented. Thus, article II of the implemented proposal, *Rights of Management*, provides that the Company retains the sole right and authority to:

> Section 1. [M]ake, change, and enforce reasonable rules for efficiency, cleanliness, safety, attendance, conduct and working conditions.
>
> . . . .
>
> Section 3. The Company reserves the right, in its sole discretion, to make reasonable rules and regulations for the purpose of efficiency, safe operation, and maintaining order and discipline among the workforce.

Article III, *Union Rights and Obligations*, provides:

> The Union understands the Company has the right to make and enforce reasonable rules and regulations and agrees to uphold such rules and regulations in regard to . . . the employees' conduct on the job, and all other reasonable rules and regulations established by the

> Company which are not in conflict with this Agreement.

Similarly, in article XII, *Discharge, Discipline and Company Rules*, the contract states:

> The Company alone has the right to make such reasonable rules and regulations, subject to the Union's right to grieve the reasonableness, as it may from time to time deem best for the purposes of maintaining order, effecting safe operation of the plant, and promoting efficiency. The Company will give the Union a copy of any new or changed rule prior to putting said rule into effect. The Union agrees to uphold such rules and regulations established by the Company.

According to Rudy Pilney, Respondent's director of industrial relations and its chief negotiator, the Union agreed to the foregoing language of article XII. Herman Holley, the Union's International representative and its chief negotiator, did not dispute that tentative agreement had been reached with respect to portions of the management-rights clause, including the language regarding rule making. However, that tentative agreement depended on the parties' agreeing on an acceptable grievance procedure.

The Employer proposed a three-step grievance procedure. The first step was discussion between the supervisor and the aggrieved employee; the second step called for reduction of the grievance to writing and a written response from the industrial relations manager. The third step provided for a meeting with the plant manager to discuss the grievance, on the Union's request, and a written reply from the plant manager within 5 workdays after that meeting.

The proposed grievance procedure culminated in either voluntary arbitration or the right to resort to economic force, including the Union's right to strike and the Employer's right to lock out its employees. The Union, however, sought mandatory arbitration as the final step in this procedure, which the Employer opposed. No agreement was reached and the Employer's proposal was included in the language which it implemented.

Pilney stated that its proposals on rules were ''made with the intention under the old contract that the rules were part of the contract and were very restrictive [so] that every time that you wanted to make a change or modify a rule that it was required that you sit down with the Union,'' i.e., engage in collective bargaining. Respondent's proposal was geared to permit it ''to change, modify, or alter rules without the hassle of sitting down with them every time as long as they were reasonable.''

The implemented final offer, under *General Plant Safety Rules*, included the following rule on smoking:

> No Smoking—No smoking or use of any type of open flame-producing device in areas where prohibited.

There was some discussion of, but no agreement on, the areas in which smoking or an open flame would be prohibited. There was no proposal, and no discussion, of any rule which would have prohibited the use of tobacco throughout the Company's property.

In August 1990, Respondent posted a notice stating that it would be a ''No Tobacco Usage Facility,'' effective January 1, 1991. The notice remained posted for about 1 hour and was then removed by Kathy Brown, the plant's personnel manager.

A new tobacco rule was posted on January 11, 1991.[1] It stated:

> NOTICE
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> Effective April 1, 1991 Southwire Starkville will become a No Tobacco usage facility. Effective April 1, 1991 no tobacco usage will be permitted within the property lines of Southwire Company. Property lines include plant, office, company vehicles and all parking lots as well as grounds surrounding these areas.

The Union had not received any prior notice of this rule; no bargaining preceded the posting. On February 20, Philander Clay, president of the Local Union, wrote Respondent, requesting ''a meeting . . . to negotiate the reasonableness of the 'No Smoking' policy, pursuant to Article XII.''

Pilney replied on February 27. His letter reasserted Respondent's right, under the implemented final offer, to make reasonable rules subject only to the Union's right to grieve the question of reasonableness. He referred the Union to the grievance procedure as its only appropriate forum.

A grievance, supported by more than 75 employees, was filed at the second step on March 21. It sought permission for the employees to smoke outside the plant and in a designated area within the building. The personnel manager denied the grievance, in writing, on March 25. The plant manager denied the Union's appeal on May 9. The record does not indicate whether the parties met, as provided in the grievance procedure, and, if they did, what discussions were held. At each step, Respondent maintained that the no-tobacco rule was a corporate policy which would remain in effect.

After the third step, the Union requested arbitration. As it has with all of the Union's requests for arbitration, Respondent refused. The Union opted against striking in support of its position.

On September 25, Respondent issued a written warning to employee Lannie Biddle for violating its no-tobacco usage rule. The parties have stipulated that that warning was lawful if Respondent's promulgation and adoption of the rule was lawful.

2. Analysis

Recent Board precedent establishes, both clearly and succinctly, ''that a ban on smoking on an employer's premises during working hours is a mandatory subject of bargaining.'' *W-I Forest Products Co.*, 304 NLRB 957, 959 (1991).

In so holding, and in reaffirming earlier cases which had so held,[2] the Board noted that however laudable an employer's efforts to protect its employees' health by banning smoking, such a ban does ''not go to the heart of the Respondent's business'' as an ethics code does for newspaper report-

[1] All dates hereinafter are 1991 unless otherwise specified.

[2] *Albert's, Inc.*, 213 NLRB 686, 692–693 (1974); *Chemtronics, Inc.*, 236 NLRB 178, 190 (1978).

ers.[3] It specifically found that the employees' right to smoke at work is ''germane to the working environment'' within the ambit of the Supreme Court's decision in *Ford Motor Co. v. NLRB*, 441 U.S. 448, 498 (1979) (prices of food at an in-plant cafeteria). The Board stated:

> Although smoking is not as critical to life-functioning as food in a cafeteria, and indeed may be deleterious to health, it is nonetheless a part of the working environment in which many smokers function. In addition, we note that in the instant case, a breach of the rule would constitute grounds for disciplinary action, including discharge and suspension.

The Board further found that a total ban on smoking, where smoking had been previously restricted but permitted, had a ''significant, substantial, and material impact on the employees terms and conditions of employment.'' Such a ban is, therefore, subject to the bargaining obligation. *W-I Forest Products*, supra.

Respondent contends, however, that as the implemented final offer contained language which permitted it to create, implement, and enforce new rules without bargaining, it was free from further bargaining obligations to adopt and impose its tobacco ban.[4] General Counsel disagrees, arguing that, under *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1991),[5] an employer's implementation of a final offer does not waive the union's statutory right to be consulted over changes in mandatory subjects of bargaining.

In the *Colorado-Ute* negotiations, the employer had insisted that any wage increases would have to be in the form of merit increases, as determined solely by management. The union rejected its proposals; the employer implemented a final offer which provided that ''[t]he amount and frequency of such merit increase will be determined by the Division Head and President and will not be subject to the grievance procedure.'' Thereafter, a merit pay program was announced and implemented. The union was denied any role in determining either the criteria for merit increases or the appropriateness of merit increases which were granted or denied and was precluded from objecting to the merit increases as determined by management through the grievance procedure.

The Board noted that merit wage increases are a mandatory subject of bargaining, over which the parties have a duty, and the union has a statutory right, to bargain. That includes bargaining concerning the procedures and criteria for the raises as well as the actual raises granted. The employer's proposal in *Colorado-Ute* gave it virtually unlimited discretion with respect to those increases. The Board found that a proposal which would deny the union its right to bargain on such a subject, is in effect one which seeks a waiver of the union's statutory rights under Section 8(a)(5). It went on to say:

> The Board requires that waiver of bargaining rights under Section 8(a)(5) not be lightly inferred but must be clear and unmistakable. *Tocco Division of Park-Ohio Industries*, 257 NLRB 413, 414 (1981), enfd. 703 F.2d 624 (6th Cir. 1983). Here, despite earnest effort, the Respondent was unable to secure the Union's waiver of its right to bargain over the merit increases' timing and amounts. The Union never agreed to contractual language waiving its right to bargain. Nor does the parties' bargaining history establish a waiver. The Union, both before and after the impasse, expressed its opposition to the Respondent's merit proposal for, among other things, precisely the fact that it would exclude the Union from participation in the merit pay program.
>
> [T]he Respondent was free to insist to impasse as a condition to agreement . . . that the Union agree to waive the statutory rights at issue here. But the Respondent's freedom to pursue this end and to exert this bargaining pressure to obtain this end does not carry with it a right, once having failed and reached impasse, to proceed with implementation of the final offer as if the Respondent had successfully secured the Union's waiver. [*Colorado-Ute*, at 609.]

Thus, the Board held, while the employer was free to consider its employees for merit increases, and grant those increases using the criteria it had proposed, it was not free, in the absence of the union's waiver, to do so without consulting the union.

Colorado-Ute was denied enforcement in the Tenth Circuit (939 F.2d 1392 (1991)), the court holding that an employer's right to implement its proposals upon impasse extends to proposals which would allow wage increases upon management's sole discretion. Respondent would have me apply the circuit court's decision to the instant matter.[6] I need not reach that question inasmuch as the instant case is factually distinguishable from *Colorado-Ute*.

In *Colorado-Ute*, the employer sought unilateral discretion to set and grant merit wage increases, precluding the union even from grieving over any aspect of them. Thus, the union could neither discuss nor protest the increases. In the instant case, however, the Union had the right to notice of any rule change before implementation, the right to file a grievance over any rule with which it disagreed, the right to discuss the reasonableness of that rule with the highest management representative in the plant and, if still unsatisfied, the right to strike. In *Colorado-Ute*, the employer's proposal put the union into a worse position, with fewer rights, than if there had been no negotiations. Here, however, the Union remains in essentially the same position as it was before negotiations; it has the right to bargain with the Employer over any rules the Employer proposes to implement, and it has the right to strike or exert other lawful economic pressure in support of its bargaining position.

The Employer's implemented final offer left the Union with its statutory rights essentially intact, the Union had the right to consult with management over the reasonableness of any new rules before implementation, apparently did so at

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[3] See *Capital Times*, 223 NLRB 651 (1976), and *Peerless Publications*, 283 NLRB 334 (1987).

[4] I reject the Respondent's implication that the Union's tentative agreement to such provisions in the course of negotiations bound it to them or its acceptance of other rule changes constituted a waiver. Even assuming that any effect should be given to piecemeal agreements, any agreement here was conditioned upon the availability of mandatory arbitration as the final step in the grievance procedure.

[5] The General Counsel inadvertently referred in brief to *Colorado-Ute* as *Johnson-Bateman Co*.

[6] The administrative law judge is, of course, required to apply clear Board precedent unless and until reversed by the Supreme Court. See *Waco, Inc*., 277 NLRB 746 fn. 14 (1984). The Board law is as stated in *Colorado-Ute*.

the third step of the grievance procedure[7] and could have ''hit the bricks.'' It cannot be said, therefore, that the Employer implemented a proposal which contained a waiver of the Union's statutory rights or refused to bargain with the Union when it announced the no-tobacco usage rule, subject to the Union's right to grieve. I shall therefore recommend that this allegation, and the related allegation relating to the warning given employee Lannie Biddle, be dismissed.

C. *Refusal to Furnish Information*

1. The facts

Prior to Hi-Tech's acquisition of the plant, when an employee was given a written warning, the Union received a copy. Respondent stopped furnishing the Union with copies in August 1990. Since Respondent does not give the employee a copy of the written warning, the Union gets to see the warning only after a grievance is filed.

In September 1990, the Union filed a grievance asking that the employee be given a copy of any written warning when it is issued. The grievance was rejected at the final step of the grievance procedure, on January 10, 1991, on the basis that the implemented final proposal did not call for a copy of the warning to be given to the employee. According to the General Counsel, the Employer's procedure forces it to file grievances from memory, without access to the actual warning.

On July 31, 1991, after employee Rose Nichols was discharged for allegedly ''cussing'' a supervisor, the Union requested Nichols' production records and all records and absentee reports on Nichols and another employee. The information was requested so that the Union would ''be able to intelligently represent the above Bargaining Unit employees.'' No information was furnished.

In response to a grievance, the plant manager changed Nichol's discharge to a suspension without pay. Nichols subsequently received her lost wages as a result of a settlement of an unfair labor practice charge which the Union had filed on her behalf. According to Pilney, the Union's request for information got lost in the course of the grievance handling and the resolution of the unfair labor practice charge.

2. Analysis

Respondent does not deny that it ceased an existing practice of providing either the Union or the employee with a copy of a written warning when issued. Its answer to the Union's September 17, 1990 grievance seems to imply that the absence of a specific requirement in the implemented proposal that it do so privileges this change and its refusal. Respondent, I believe, takes an unduly parochial view of its implemented proposal.

As stated in *Colorado-Ute*, supra at 609, after a good-faith impasse is reached, an employer may implement changes consistent with the proposals which it made to the union in negotiations. That does not mean that it may act as if there had been no prior agreement or practice. Contractual terms generally remain in force after a contract's expiration. See *Stephenson-Yost Steel*, 294 NLRB 395, 396 fn. 7 (1989) (continuation of economic terms). Here, there is no evidence, either in the implemented proposal or elsewhere, that Respondent had proposed elimination of this practice. Therefore, the absence of any language specifically continuing it is irrelevant. The unilateral change in this practice violates Section 8(a)(5) and (1).

Moreover, I agree with the General Counsel's contention that, where an employer fails to provide the disciplined employee with a copy of a written warning, his union is entitled to a copy before a grievance is filed. In *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989), the Board approvingly quoted the following language from *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976), with respect to information sought with respect to the filing or processing of grievances:

> It is not required that there be grievances or that the information be such as would clearly dispose of them. The Union is entitled to the information in order to determine whether it should exercise its representative function in the pending matter, that is, whether the information would warrant further processing of the grievance or bargaining about the disputed matter.

The implemented proposal (article X, *Grievance Procedure*, section 3, step 2) requires that a grievance ''contain the exact nature of the grievance, the act or acts complained of, by who, and when the act or acts occurred.'' Here, as argued by the Union, without the requested information, it would be forced to file grievances based on an employee's memory of what a supervisor had said. Not only would the Employer's practice prevent the Union from evaluating a discipline to determine whether a grievance was warranted, it would prevent the Union from satisfying the implemented proposal's rigid specificity requirements if a grievance were to be filed.

Respondent contends that the failure to supply the information requested with respect to the Nichols' discharge was a mere oversight, not warranting a remedial order. I cannot agree. It took the filing of both a grievance and an unfair labor practice charge to resolve Nichol's grievance. Perhaps, if the Union had been furnished the information in a timely fashion, it could have been resolved completely at the first stage, saving everyone's valued resources. The Union is entitled to information necessary to intelligently represent its members. The Employer's failure to timely supply that information denied it that ability and I find the denial violative of Respondent's bargaining obligation. If, in fact, the failure was an oversight, of which I have some doubt, this will serve as a reminder of its obligation to prevent such requests from going astray in the future.

Accordingly, I find that by unilaterally altering its past practice with respect to the furnishing of copies of written warnings to employees so disciplined, and by refusing the Union's request that it or the employee be furnished with such copies, and that it be furnished with information necessary to intelligently represent its members, Respondent has failed to bargain in good faith in violation of Section 8(a)(5) and (1).

[7] If Respondent had refused to meet with the Union at that step, a different case, warranting a contrary result, would have been presented. The General Counsel, whose burden of proof it was, neither alleged nor proved such a refusal.

D. *Mickle Smith's Discharge*

1. The facts

a. *Background*

Mickle Smith was a bargaining unit employee, hired in June 1989. In late July 1991, he was recalled from layoff and assigned to the bailing wire department on the second shift as an operator. Initially, his immediate supervisor was the first-shift supervisor, Willie Nealy. After 2 weeks, Donnie Glenn was appointed foreman for the second shift in this department. Jerri Tate was the department manager.

Smith's job was to run two stranding machines, referred to as S-2 and S-3. The stranders are similar to looms, taking a number of wires which come off of bobbins (spools) and plaiting them together to form a single multistrand wire. S-2 was used to produce seven-strand wire of various gauges (i.e., diameters); S-3 was capable of running larger wires, including 19-strand wire, also of various gauges. The 19-strand wire is made up of a 7-strand core produced on the S-2, plus 12 additional wires which were plaited to it on the S-3.

The single-strand wires which make up the finished product come on bobbins which may weigh up to 100 pounds. The strander operator orders the necessary bobbins from the forklift driver, according to the wire to be produced on his shift. They are placed on the stranders by the operator using a jack. The operator then threads the separate wires in to the strander, makes the required connections and observes the operation of the machine while it is running, replacing the bobbins and reconnecting the wires as necessary. The frequency with which he is required to change bobbins depends on whether the bobbins were full or partly used when he started them. Smith had received about a week's worth of training, from the operators on the first and third shifts, on running each machine. While he was being trained on S-3, S-2 continued to be run. For most of the time he worked after being trained, he ran only a single machine at any one time, generally S-2.

b. *The alleged agreement*

Shortly after the strander operators were recalled in late July, they were told that they would be expected to run S-2 and S-3 simultaneously. Smith sought to file a grievance.[8] Similarly, Walter O'Bryant, formerly the first-shift strander operator,[9] complained to Nealy, and indicated that he intended to file a grievance. Both were told that a grievance would not be necessary. They, and Joe Shumaker, local union president and chief steward, were told by Tate and/or Nealy that they would only be required to run both machines with ''small'' wire running on each machine. Shift steward McNeese was told by Nealy that management was preparing a schedule of which wires would run simultaneously.

Department Manager Tate acknowledged that the employees had complained about having to run two machines. No grievance was filed, he said, because he told O'Bryant that they would not be required to run ''large'' wire and 19-strand wire simultaneously.

As noted, both the 7-strand and the 19-strand wires are produced in various diameters. What management intended would be run during the dual operation, and what the employees understood would be run at such times, did not necessarily agree. Tate testified that he intended that the S-2 would not run a large gauge 7-strand wire while the S-3 was running a 19-strand wire. Shumaker, Smith and O'Bryant appear to have understood that they would not be required to run both machines when S-3 was running a 19-strand wire.

c. *Events of September 3, 1991*[10]

On the evening of September 3, Foreman Glenn received production orders requiring that S-2 be run with 8-strand 7 wire and that S-3 run simultaneously, with 3-0 19-strand wire. When given these instructions, Smith ''showed some resentment.'' He told Glenn that it was too much work and he was afraid that he might ''mess up.'' Smith then spoke with his steward, McNeese, who told Smith of his understanding regarding the circumstances under which both stranders would be run. Smith then told Glenn ''that he had heard they said if 19 wires is involved in the combination that only one strander would have to run.''

Glenn told Smith that he would check that out. He called Tate, who had already left the plant for the day. Glenn explained the situation to Tate and was told that the planned combination was okay to run. Glenn relayed this back to Smith; Smith said that he would give it a try. According to Glenn, Tate had said that he would post a list of the permissible combinations for simultaneous operation.

Glenn continued to make his rounds about the department and returned to Smith's area about 6 or 6:30 p.m. Glenn saw that no progress had been made toward starting up S-3 and repeated his order that Smith do so. Smith said nothing but continued to work on S-2. As he left the area, Glenn observed Smith again going over to McNeese, the steward.

At about 7 p.m., Glenn assigned McNeese, whose machine had run out of wire, to assist another employee on a repacking job. McNeese felt that the job did not require his help and offered instead to assist Smith in operating S-3. McNeese told Glenn that there was no way that Smith could operate both stranders and get any production out of them. Glenn replied that S-3 was Smith's responsibility. McNeese

[8] According to Smith and McNeese, a steward, the simultaneous operation of two stranders posed a safety hazard, particularly the risk that the operator would be more likely to be struck by an improperly secured bobbin projected off of the machine while tending a second machine. However real their fears, the actual risk appears to be miniscule and basically unrelated to the operation of the second machine, whether that second machine was running ''large'' or ''small'' wire.

[9] O'Bryant was terminated by Respondent several days prior to the hearing.

[10] Unless otherwise noted, or where Smith's testimony is corroborated by other credible testimony, the following description of events is based on the testimony of Donnie Glenn. I found Glenn to be more accurate in his rendering of the facts; Smith's testimony was not entirely consistent with that of other witnesses for the General Counsel or with the documentary evidence; it appeared to be shaded so as to place his actions in the light which the witness apparently thought reflected best upon him. In this regard, I note particularly Smith's claim that there were no materials to be run on S-3 and that S-3 was not operative, facts inconsistent with both the testimony of other witnesses and the grievance filed over his discharge. Glenn, on the other hand, related a candid, coherent, and more probable version of the events.

then stated that he intended to file a grievance based on the understanding that the operator would not be responsible for running both machines when one of them was running ''large'' wire. Glenn said that he knew nothing of such an understanding, that he took his orders from his boss, that McNeese had a right to file a grievance but, at that moment, he was needed to repack wire.

After Smith's 8:30 p.m. lunchbreak, Glenn went again to Smith's work station where he observed that no effort had been made to start S-3. He asked Smith what was wrong; Smith did not reply. Glenn repeated his order that Smith run S-3. He did not warn Smith of the consequences of his failure to comply.[11] He continued to watch Smith for a period of time, during which Smith made no effort to comply with Glenn's order.

Glenn next went to the acting night superintendent, Bill Whittle. He told Whittle of the repeated orders to Smith and of Smith's repeated failure to comply. Glenn recommended sending Smith home for the remainder of the shift, to return the next morning when a decision would be made concerning the appropriate discipline. Together, Glenn and Whittle went to the steward, McNeese, and told him what they were going to do. All three went to Smith's work station where Smith was informed of his suspension. McNeese tried to explain that Smith had been operating S-2 with partial bobbins and asserted that it was unsafe for the operator to have to run both machines. Glenn paid little attention to what McNeese said; he said that he ''didn't go to [McNeese] so that [McNeese] could alter my decision. I was just informing him of what I was going to do.''

On the following day, after discussions with higher management, and after reviewing Smith's personnel file (which contained a single warning for absenteeism nearly a year earlier),[12] Glenn recommended discharge. His recommendation was followed.

Smith filed a grievance which alleges that he was preoccupied with tending S-2 when ordered to set up and run S-3, that the dual operation posed a safety threat and that the order was contrary to a verbal agreement between Tate and the operators that ''they would not have to run S-2 and S-3 at the same time when a 19 wire set up was involved.'' It makes no mention of a shortage of material or mechanical problems in getting S-3 to run. Respondent denied the grievance at all steps. It was the position of Respondent's manager of industrial relations, stated at the second step, that Smith should have performed the duties and then grieved the assignment.

2. Analysis

When the strander operators were first directed to operate S-2 and S-3 simultaneously, they protested and voiced their intentions to file a grievance. Respondent avoided that grievance when Tate agreed that the dual operation would not be required under certain circumstances. Unfortunately, the ambiguities inherent in describing wire as ''large'' and ''small'' or other communication problems prevented the parties from understanding exactly what Tate intended. The operators and Union representatives understood that he would not require both stranders to be run when S-3 was running a 19-strand wire. Tate insists that he only agreed that S-3 would not run with 19-strand wire if S-2 was running a large gauge wire.

Under either Smith's or Glenn's version of the events, it is clear that Smith's refusal to run S-3 was based, in significant part, upon his understanding of the foregoing agreement. Both he and McNeese raised that issue in protesting Glenn's assignment. The question is: was Smith's refusal to perform the work assigned to him, in reliance upon his understanding of that agreement, a protected concerted activity? The answer is provided in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

In *City Disposal*, the Supreme Court (Justices O'Connor, Powell, and Rehnquist, and Chief Justice Berger dissenting), upheld the Board's longstanding *Interboro* doctrine, *Interboro Contractors*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). That doctrine holds that a single employee's assertion of a right grounded in a collective-bargaining agreement is recognized as concerted activity protected under Section 7. The Court specifically stated (at 833–834, that:

> The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process—beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity. [Footnote omitted.] Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer.

The Court, noting that the union had secured the agreement on the basis of its collective strength, stated:

> It was just as though [the employee] was reassembling his fellow union members to reenact their decision not to drive unsafe trucks. A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense. [Ibid.]

In the instant case, there was no collective-bargaining agreement expressly setting forth an employee's right to refuse to operate the stranders under certain conditions. There was, however, the equivalent. Tate's promise that the operators would not be required to operate their machines when certain combinations of wire were being produced was given in resolution of an incipient grievance and/or in return for the waiver of the right of several employees and the union to file a grievance. By that promise, an industrial dis-

[11] Glenn testified that he believed it ''unethical for [Smith] not to do [his job].'' He did not warn Smith because he did not think it necessary that he ''beg his employees to work.'' Suffice it to say that the managerial style appropriate for leading troops in a military operation (Glenn had recently returned from Operation Desert Storm) is not necessarily transferrable to the industrial setting.

[12] That warning threatened discharge for an additional attendance violation within a year; a written warning and 5-day suspension was threatened for violation of any other rule.

pute was adjusted in an amicable way.[13] Here, again, the Supreme Court's language, at 833–834, is applicable:

> The *Interboro* doctrine is also entirely consistent with the purposes of the Act, which explicitly includes the encouragement of collective bargaining and other practices fundamental to the friendly adjustment of industrial disputes arising out of . . . working conditions.

The Court also noted at 836 that the Section 7 right covers employees in both the negotiation of an agreement and in the enforcement of that agreement.

Respondent contended that Smith should have complied with Glenn's orders and filed a grievance. It might have argued, but did not, that Smith was in error concerning the extent of Tate's commitment. Turning once more to the Court's pertinent language, we find, at 836–839, the following guidance on both questions:

> Thus, for a variety of reasons, an employee's initial statement to the employer that he believes a collectively bargained right is being violated, or the employee's initial refusal to do that which he believes he is not obligated to do, might serve as both a natural prelude to, or an efficient substitute for, the filing of a formal grievance. As long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity, just as he would have been had he filed a formal grievance.

The Court also noted that had the employee complied with the order, in that case to drive a truck he which deemed unsafe, he might have mooted the issue. It found his refusal to obey the order ''reasonably well directed toward the enforcement of that right.'' Finally, the Court concluded at 840:

> The rationale of the *Interboro* doctrine compels the conclusion that an honest and reasonable invocation of a collectively bargained right constitutes concerted action, regardless of whether the employee turns out to have been correct in his belief that his right was violated.

In *City Disposal*, the Court remanded the case to determine whether the employee's action, although concerted, lost its protected nature because it violated some prohibition in the contract, such as a no-strike clause or express prohibition against refusing to perform work. In the instant case, there is no contract. The implemented final offer expressly retains the Union's right to strike and, under the rationale of *Colorado-Ute*, could not impose a waiver of that right absent the Union's clear and unequivocal agreement thereto even if it purported to do so.

In sum, I find that Mickle Smith was engaged in protected concerted activity when he, together with his union steward, honestly and reasonably protested that Glenn's work assignment contravened an agreement reached in the preliminary stages of grievance resolution. When he insisted, however inarticulately, upon enforcement of that agreement, he continued to engage in a protected concerted activity. For that activity, he was discharged. A discharge for engaging in protected concerted activity violates Section 8(a)(1) of the Act, and I so find with regard to Mickle Smith's discharge.

CONCLUSIONS OF LAW

1. All hourly rated production and maintenance employees at Respondent's cable and wire plant in Starkville, Mississippi, excluding office and clerical employees, technical employees, professional employees, management and supervisory employees as defined in the Act and guards constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. The Union is, and has been at all material times, the exclusive representative of the employees in the foregoing unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

3. By discharging Mickle Smith because he engaged in protected concerted activity, the Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. By refusing to give either the Union or the employee to whom a written warning is given a copy of that written warning before a grievance is filed, and by refusing to furnish the Union with other information it requested which was necessary to the processing of grievances and to the fulfillment of its responsibilities as the exclusive representative of the employees in the appropriate unit, the Respondent has failed and refused to bargain in good faith with the Union and has violated Section 8(a)(5) and (1) of the Act.

5. The Respondent has not, in any other manner alleged in the complaint, violated the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discharged an employee because that employee engaged in protected concerted activities, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[13] It is on this basis that both the *Meyers* cases (*Meyers Industries.*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) and 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) and *Mannington Mills*, 272 NLRB 176 (1984), are distinguishable. In neither case was the employee attempting to enforce a collectively bargained right.